BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

HOA T. BACH	)	
Claimant	)	
	)	
VS.	)	
	)	
NATIONAL BEEF PACKING COMPANY, LP	)	
Respondent	)	Docket No. 1,044,800
	)	
AND	)	
	)	
AMERICAN ZURICH INS. CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the May 11, 2009, preliminary hearing Order For Compensation entered by Administrative Law Judge Pamela J. Fuller. Gary E. Patterson, of Wichita, Kansas, appeared for claimant. Kerry McQueen, of Liberal, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant sustained injuries as a result of an accident that arose out of and in the course of her employment with respondent. Accordingly, respondent was ordered to pay claimant temporary total disability benefits and medical expenses, as well as payment to Phung Duc Nguyen for care provided to claimant.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 8, 2009, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent requests review of the ALJ's finding that claimant was injured by an accident that arose out of and in the course of her employment. Respondent argues that there was nothing about claimant's employment that enhanced her risk of being injured by

the wind elements such as occurred on the date of her injury and further contends that risk was shared by everyone in that vicinity. Respondent further argues that Kansas law does not recognize an injury such as occurred to claimant as arising out of employment.

Claimant argues that her injury was caused when she was thrown into a railing or fence by a sudden gust of wind while she was walking to a car after work but while she was still on respondent's property. She argues that because she was required to be exposed to the elements when walking to and from the building and parking lot, this constituted an injury which arose out of her employment. Accordingly, claimant requests that the ALJ's Order for Compensation be affirmed.

The issue for the Board's review is: Did claimant suffer an injury that arose out of and in the course of her employment with respondent?

FINDINGS OF FACT

Claimant is 69 years old and weighs 120 pounds. She testified that on February 20, 2009, she clocked out of work at about 10 p.m. She planned to ride home with her husband, son and daughter-in-law. Her son had told her that he would get the car and would meet her so she would not have to walk all the way to the parking lot. When claimant's son drove up, claimant and her husband and daughter-in-law walked toward the car. They were required to walk across a traffic way or street past the guard shack. It was a very windy night, and as claimant was walking toward the car, she felt a gust of wind pick her up, and she fell into a steel railing or fence. She suffered injuries from the fall and has not yet returned to work.

Claimant testified that when she was working in the plant, she did not know the weather conditions outside. There was no one at the door to warn her of the wind gusting excessively that night. She was not warned to stay in the building until the wind died down.

Claimant's son testified that he left work about 10:25 p.m. and went to the parking lot to get the car. He said that his mother usually waits for him in the cafeteria. He said the night of her accident he had some trouble walking out to the car because it was windy.

George Hall, respondent's Human Resources Director, testified that the distance between the cafeteria and the security area was about 100 feet and the distance between the security area and the railing or fence was 40 to 50 feet. Mr. Hall also testified that it is not company policy that employees have to leave the plant when they clock out and that it is fairly common for employees to use the cafeteria to socialize after they clock out. He also testified that employees are not made aware of weather conditions as they are working or right before they leave, unless there is a tornado warning.

Weather records introduced as an exhibit to the preliminary hearing show that between approximately 10 p.m. and midnight on February 20, 2009, the wind speed ranged from 11 to 40 miles per hour with gusts up to 46 miles per hour.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[1] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[2]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[3]

The "going and coming" rule contained in K.S.A. 2008 Supp. 44-508(f) provides in pertinent part:

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[1] K.S.A. 2008 Supp. 44-501(a).

[2] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[3] *Id.* at 278.

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. **An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer** or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. (Emphasis added.)

K.S.A. 2008 Supp. 44-508(f) is a codification of the "going and coming" rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.[4] In *Thompson*, the Court, while analyzing what risks were causally related to a worker's employment, wrote:

> The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.[5]

But K.S.A. 2008 Supp. 44-508(f) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's premises.[6] Another exception is when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.[7]

In *Faulkner*,[8] the Kansas Supreme Court stated:

> When the injury occurs from the elements, such as a tornado, or the like, the rule is that in order for it to be said the injury arose out of the employment, and thus compensable, it is essential there be a showing that the employment in some

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[4] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, Syl. ¶ 1, 416 P.2d 754 (1966).

[5] *Thompson* v. *Law Offices of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

[6] *Id*. at Syl. ¶ 1. Where the court held that the term "premises" is narrowly construed to be an area controlled by the employer.

[7] *Id*. at 40.

[8] *Faulkner v. Yellow Transit Freight Lines*, 187 Kan. 667, Syl. ¶ 2, 359 P.2d 833 (1961); see also *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

> specific way can be said to have increased the workman's hazard to the element–that is, there must be a showing of some causal connection between the employment and the injury caused by the element, and that his situation was more hazardous because of his employment than it would have been otherwise.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[10]

ANALYSIS

The ALJ, citing *Rinke*,[11] found this claim compensable because the accident occurred on respondent's premises. However, when an injury is due to weather, such as wind, there must be a showing that the employment increased the risk of injury in some way. In other words, for an injury to arise out of the employment, there must be a causal connection between the injury and the employment in such a way that the situation was more hazardous because of the employment than what it was to the public in general or what it would have been absent the employment.

In this case, there was nothing about the employment that caused claimant to be outside at the time she was other than the fact her shift had ended and she was ready to leave. Claimant could have stayed inside in the cafeteria. Claimant knew it was windy when she exited the building. She acknowledged that if it had been hailing, for example, she would not have gone outside but instead would have remained inside the building until the conditions improved. The employment did not place claimant in a situation where she was at greater risk than was the public in general in that vicinity. Arguably, claimant would not have been outside at that time but for her employment. However, claimant had the choice of remaining inside the plant. And although claimant did not know the weather conditions until she went outside, there is no evidence that she would not have gone outside when she did had she had that information. So this is not a situation like in *Faulkner* where claimant might have taken refuge from the tornado if he had been given that option. Moreover, claimant would most likely have been equally exposed to the wind had she been walking in the parking lot of a local grocery store or even at home in her driveway. Thus, claimant was subjected to the same risk or hazard as was the general public in that general vicinity at that time.

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[9] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[10] K.S.A. 2008 Supp. 44-555c(k).

[11] *Rinke v. Bank of America*, 282 Kan. 746, 148 P.3d 553 (2006).

CONCLUSION

Claimant's accident and injury did not arise out of her employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated May 11, 2009, is reversed.

IT IS SO ORDERED.

Dated this _____ day of August, 2009.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Gary E. Patterson, Attorney for Claimant
Kerry McQueen, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge